LE COPY

Office-Supreme Court, U.S.
FILED
MAY 11 1959
JAMES R. BROWNING, Clerk

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1958

No. 830

MAGNUS J. PETERSEN,
Appellant,

vs.

STATE OF CALIFORNIA,
Respondent.

On Appeal from the Supreme Court of the State of California.

MOTION TO AFFIRM.

STANLEY MOSK,
Attorney General of the State of California,
CLARENCE A. LINN,
Assistant Attorney General,
ARLO E. SMITH,
Deputy Attorney General,
THOMAS C. LYNCH,
District Attorney of the City and County of San Francisco,
DION HOLM,
City Attorney of the City and County of San Francisco,
GEORGE BAGLIN,
Deputy City Attorney of the City and County of San Francisco,
600 State Building, San Francisco 2, California,
Attorneys for Respondent.

Subject Index

	Page
Jurisdiction	1
Questions presented	2
Statement	2
Argument	3
The present appeal involves questions concerning the regulation of a local business which by its nature is subject to a public franchise	3
The decision of the California Supreme Court was based on familiar and well-established principles	6
There is no conflict in the decisions in the various state courts on the questions here involved which requires this court's attention	8
Conclusion	9

Table of Authorities Cited

Cases	Page
Buck v. Kuykendall, 267 U.S. 307	6
City of New York v. Reesing, 77 N.Y.S. 82	5
Davis v. Massachusetts, 167 U.S. 43 (42 L. ed. 71, 17 S. Ct. 731)	8
Fischer v. St. Louis, 194 U.S. 361 (48 L. ed. 1018, 24 S. Ct. 673)	8
In re Flaherty, 105 Cal. 558	8
Lieberman v. Carr, 199 U.S. 552 (50 L. ed. 300, 26 S. Ct. 144)	8

Pages

Packard v. Banton, 264 U.S. 140 6

People v. Galena, 24 Cal. App. 2d Supp. 700 6

Rose v. California, 19 Cal. 2d 713, 123 P. 2d 505 7

Thomas Cusack Company v. Chicago, 242 U.S. 526 ..... 5, 7

Wilson v. Eureka City, 173 U.S. 32 (19 S. Ct. 317, 43 L. ed. 603) 8

Rules

Revised Rules of the Supreme Court of the United States: Rule 16 1

Codes

California Code of Civil Procedure, Section 1094.5 7

Police Code of San Francisco, Section 1156a 2

Charters

Charter of San Francisco, California, Statutes 1931, Sec. 39, p. 2973 2

Texts

Dillon on Municipal Corporations, 5th ed., p. 937 8

In the Supreme Court
OF THE
United States

October Term, 1958

No. 830

Magnus J. Petersen,	*Appellant,*
vs.	
State of California,	*Respondent.*

On Appeal from the Supreme Court of the State of California.

MOTION TO AFFIRM.

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the order of the California Supreme Court discharging the writ of habeas corpus be affirmed on the ground that the question is so unsubstantial as to warrant no further argument.

JURISDICTION.

The jurisdictional requisites are adequately set forth in appellant's jurisdictional statement.

QUESTIONS PRESENTED.

Is a local ordinance which prohibits taxicabs from standing on any street awaiting employment except at public stands established at or near the entrance to docks, railroad depots and around public squares, without a permit, unconstitutional as a violation of the due process and equal protection clauses?

Is a local ordinance which provides that the chief of police may designate stands at particular locations and issue licenses to particular cab companies to stand in those locations with the consent of the abutting property owner or his ground-floor lessee, where the action of the chief of police is subject to review by the Board of Permit Appeals (established by the Charter of the San Francisco, California, statutes, 1931, p. 2973, section 39) on appeal of the applicant if permit is denied or on the appeal of any interested person if the permit is granted, unconstitutional, a violation of the due process and equal protection clauses?

STATEMENT.

The appellant Petersen was arrested in his taxicab while standing near the entrance of a hotel. He was not loading or unloading a passenger. He was not answering a call for service or discharging a passenger. He was standing in the street at the curb near the entrance of a hotel as a means of obtaining future passengers. He did not have a permit to "stand" in this location. He was arrested for violation of section 1156a of the Police Code of San Francisco.

The appellant sought a writ of habeas corpus. Upon his application the Supreme Court of California rendered the decision from which he appeals.

There is no evidence of a monopoly of taxicab service in San Francisco. The only evidence was that at the stand in question the license was granted to the Yellow Cab Company and no permit was granted to the appellant or his cab company. The evidence shows that appellant's company, of which appellant is a part owner, has been issued six exclusive stands pursuant to the police code sections here involved (see affidavit of Howard Frank attached to the return to the writ of habeas corpus).

There is no evidence of discriminatory or arbitrary action by the chief of police of San Francisco in some eighty years of operation of the ordinances in question.

ARGUMENT.

THE PRESENT APPEAL INVOLVES QUESTIONS CONCERNING THE REGULATION OF A LOCAL BUSINESS WHICH BY ITS NATURE IS SUBJECT TO A PUBLIC FRANCHISE.

Appellant poses the questions involved in terms of broad constitutional issues and in terms of a matter of nationwide concern. He likewise poses the problem as one involving monopoly.

It should be clear from the record herein that there is no evidence of monopoly and indeed no monopoly exists as to taxicab service in San Francisco. It might be noted, however, in passing that the state and mu-

nicipality could deny the use of the streets to all but one common carrier.

Furthermore, the question here is not one of national concern. It is one involving local police, traffic, safety, and public convenience problems.

The best manner in which to solve these problems of traffic, safety, and public peace as connected with taxicab service is primarily a local affair and not a national concern.

The various cities throughout this nation use various methods to solve these problems. Some use the exclusive franchise, some use open stands; some use closed stands, and some use a combination of open and closed stands, as is done in San Francisco. Most cities subject cabs to licensing, safety, and rate regulations. The choice of the best method of dealing with the problem is purely a matter for determination by the proper local authorities. There are many reasons for the method used in this instance to solve the problems of public peace, traffic congestion, safety, and service. These reasons include the following:

> Without exclusive stands it is impractical for a taxicab fleet owner to maintain city-wide on-call telephone service. Private telephone lines to stands must be used, as radio channels for use of radio phones are too limited and only supplement telephone service.
>
> The holder of an exclusive stand permit must assume responsibility to the consenting owner or his lessee to maintain continuous service at the

stand and to maintain discipline among his drivers —avoiding littering the sidewalk and street and boisterous conduct by drivers.

Exclusive stands minimize police problems. They facilitate the identification of an overcharging driver whose cab has been hired on the stand. Police supervision of the stand usually is not necessary, because the permitted operator must assume responsibility for the conduct of his drivers.

Without constant police supervision a stand open to all operators may result in continual strife and turmoil between rival drivers, endangering the peace, obstructing the street, and impairing the value of the stand for any one. (See *City of New York v. Reesing*, 77 N.Y.S. 82, 84, quoted below.)

The issue as to the exercise of the police power is purely a local matter and has been determined in favor of the exercise of that power by the highest court of this state. This court has stated that it will only interfere in such a case when it is plain and palpable that there is no real and substantial relation between the relation of the regulation to public health, safety and general welfare. See *Thomas Cusack Company v. Chicago*, 242 U.S. 526.

Here a substantial relationship of the ordinance providing for the licensing and regulation of cabs to a legitimate police power objective should be clear in view of the long custom and background of such regu-

lation and licensing. The ordinance providing for exclusive cab stands is related to very basic police powers—public safety, traffic congestion, maintenance of peace and order, and public convenience.

THE DECISION OF THE CALIFORNIA SUPREME COURT WAS BASED ON FAMILIAR AND WELL-ESTABLISHED PRINCIPLES.

Private cab stands for the convenience of the public are of ancient origin, going back in England to the reign of Queen Anne. The pattern of the San Francisco ordinance involved herein dates back to 1880. See *People v. Galena,* 24 Cal. App. 2d Supp. 770 at 776. There are many decisions which lay down the well-established principles applicable to the present case.

It is well established that a state may wholly prohibit or condition and restrict as it deems proper the use of the streets as a place of business for profit. This power to exclude includes the lesser power to condition permitted use and to exercise a degree of regulation not admissible in the case of an activity engaged in as a matter of right.

The use of the streets by a common carrier is a privilege which the state may withhold or grant on certain conditions. A taxicab stand becomes a place of business in the street—a depot, if you will. It is not the use of the streets in the usual way—to pass to and fro and to stop to load or unload.

Buck v. Kuykendall, 267 U.S. 307;
Packard v. Banton, 264 U.S. 140, 144.

It is not unusual that under a prohibitory ordinance exceptions may be made, with the consent of persons whose interests are affected. An adjoining property owner has a material interest in whether taxicabs shall stand in front of his property day and night. In California the abutting owner has appurtenant private easements in the street—distinguished from public easements therein—which are a part and portion of his property.

Rose v. California, 19 Cal. 2d 713, 727-728, 123 P. (2d) 505.

A comparable problem was presented with reference to billboards in *Cusack v. Chicago,* 242 U.S. 526.

The Chief of Police does not have an uncontrolled discretion. This problem is referred to the Chief of Police for obvious reasons. We must assume that there are traffic laws and ordinances *in pari materia* governing these subjects, and that the Chief's action will be controlled and guided by them.

In any event the Chief's discretion may not be exercised in an arbitrary or capricious manner. We have already noted that his decision is subject to review on an appeal to the municipal Board of Permit Appeals. The Board's decision in turn is subject to review in mandamus for abuse of discretion in the State Superior Court (Cal. Code Civ. Proc. §1094.5).

Where as here the basis of an ordinance is the prohibition of certain acts clearly within the municipality's regulatory power, the granting of discretionary authority, not restricted by specific standards, to confer or deny licenses or permits has long been estab-

lished by decisions of this Court. Dillon on Municipal Corporations (5th ed. p. 937).

As authority for this rule Dillon cites, among other cases:

Wilson v. Eureka City, 173 U.S. 32 (19 S. Ct. 317, 43 L. ed. 603) (citing and quoting In re Flaherty, 105 Cal. 558, cited by the court below);

Davis v. Massachusetts, 167 U.S. 43 (42 L. ed. 71, 17 S. Ct. 731);

Fischer v. St. Louis, 194 U.S. 361 (48 L. ed. 1018, 24 S. Ct. 673);

Lieberman v. Carr, 199 U.S. 552 (50 L. ed. 300, 26 S. Ct. 144).

The case last cited contains a summary of earlier decisions, including some involving obstructions on streets and sidewalks.

There is, therefore, no reasonable basis for the contention that there is any unlawful delegation of legislative power.

THERE IS NO CONFLICT IN THE DECISIONS IN THE VARIOUS STATE COURTS ON THE QUESTIONS HERE INVOLVED WHICH REQUIRES THIS COURT'S ATTENTION.

It should be noted that although appellant cites cases from New York and Maryland, the question involved in the present case has been settled in those states by statute.

All of the judicial precedents sustain the decision of the California Supreme Court. The only authorities which might appear contrary are the decisions in Ohio, Colorado and Louisiana. It should be noted, however,

that these cases go off on the ground that discretionary powers cannot in those jurisdictions be delegated by the legislative body to the executive officer or department involved. This is not the California law and raises no federal question. These decisions are also apparently based on an assertion of discrimination without documentation and in effect are expressions of local judicial policy.

CONCLUSION.

We respectfully submit that the appellant presents no substantial question for determination by this Court and that the order of the California Supreme Court discharging the writ of habeas corpus should be affirmed.

Dated, San Francisco, California,
May 8, 1959.

STANLEY MOSK,
Attorney General of the State of California,
CLARENCE A. LINN,
Assistant Attorney General,
ARLO E. SMITH,
Deputy Attorney General,
THOMAS C. LYNCH,
District Attorney of the City and County of San Francisco,
DION HOLM,
City Attorney of the City and County of San Francisco,
GEORGE BAGLIN,
Deputy City Attorney of the City and County of San Francisco,
Attorneys for Respondent.